our view this case falls within the second rule which is that the appellant would not be liable for payment of damages for loss of profits unless there is evidence before the court that the special object of the furnace had been drawn to their attention and that they contracted on the basis that delay in delivery of the particular furnace would make them liable to payment of loss of profits. In this case it would appear from the evidence that the appellant knew they were required to deliver a furnace which could produce a temperature of 2600 degrees F. By their promise to deliver the furnace within 45 days after confirmation of the order, they must be assumed to have appreciated the urgency of the matter. In this way it is reasonable to think that any delay in the delivery of the required furnace would affect the business profits of the respondent. Here the learned trial judge would appear to have in mind, indeed he said so in his judgment, that the respondent must have suffered some loss of profits. As stated by Asquith L.J. in *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*(2) at page 543: —

"..... but the true criterion is surely not what was bound 'necessarily' to result, but what was likely or liable to do so, and we think that it was amply conveyed to the defendants by what was communicated to them (plus what was patent without express communication) that delay in delivery was likely to lead to 'loss of business'."

On that principle the respondents are entitled to recover damage. The question is how much? In this case the appellant is saying that the amount awarded by the learned trial judge was execessive. It is true that the amount awarded in this case was merely conjectural. But there was at least some evidence before the court which might support the award. We refer to the evidence of PW1 Stevens Bailey Reynolds who said:

"....the furnace had a two ton capacity and we charge smelting fee of $150 per ton of which $75 goes in operation cost. Remainder is profit. However, at this time we had in stock scrap lead on which we could make a further profit of $25 per ton which together with $75 makes $100 per ton — for two tons $200. I produce a bill showing a charge of $150 per ton smelting fee.'

This part of the evidence of the plaintiff was not challenged in cross-examination. The learned trial judge, however, was not prepared to accept all of it and had, therefore, trimmed it down to $50 per day. It has not been shown in this appeal that the amount arrived at was unreasonable. As was stated by Cockburn C.J. in *Simpson* v. *The London and North Western Railway Company*(3) at page 277: —

"....as to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be matter of speculation, but that is no reason for not awarding any damages at all."

The difficulty in assessing damage was also considered in *Chaplin* v. *Hicks*.(4) On page 795 Fletcher Moulton L.J. said: —

".... I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case. There are no doubt well-settled rules as to the measure of damages in certain cases, but such accepted rules are only applicable where the breach is one that frequently occurs. In such cases the Court weights the pros and cons and gives advice, and I may almost say directions, to the jury as regards the measure of damages. This is especially the case in actions relating to the sale of goods of a class for which there is an active and ready market. But in most cases it may be said that there is no recognized measure of damages, and that the jury must give what they think to be an adequate solatium under all the circumstances of the case. Is there any such rule as that, where the result of a contract depends on volition of an independent party, the law shuts its eyes to the wrong and says that there are no damages? Such a rule, if it existed, would work great wrong."

In *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd., supra,* Asquith L.J. also said to the same effect on page 543: —

"...we agree that in order that the plaintiff should recover specifically and as such the profits expected on these contracts, the defendants would have had to know, at the time on their agreement with the plaintiffs, of the prospect and terms of such contracts. We also agree that they did not in fact know these things. It does not, however, follow that the plaintiffs are precluded from recovering some general (and perhaps conjectural) sum for loss of business in respect of dyeing contracts to be reasonably expected, any more than in respect of laundering contracts to be reasonably expected."

We are, therefore, of the view that the award of the learned trial judge in this case, conjectural though it may be, was right in principle and ought not to be interfered with.

Appeal dismissed.

Solicitors: *Joseph & Son; Skrine & Co.*

KARUPPIAH v. PETALING GARDEN CO. SDN. BHD.

[F.C. (Azmi L.P., Suffian and Ong Hock Sim F.JJ.) January 22, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 77 of 1971]

Contract — Housing development — Deposit on registration as purchaser — Whether earnest money — Whether there was concluded contract — Contracts (Malay States) Ordinance, 1950, ss. 65, 66 & 75.

This was an appeal from the decision of the High Court ([1972] 1 M.L.J. 11), dismissing the appellant's claim for a refund of $4000 paid as a deposit towards the purchase of a house.

The facts appear sufficiently in the judgment.

The appellant contended, *inter alia,* that there was no concluded agreement between himself and the respondent.

Held, dismissing the appeal: (1) the application for the purchase of the house constituted a completed contract;

(2) the deposit was earnest money, and as the appellant failed to proceed with the purchase, the respondent was entitled to forfeit it;

(3) section 65 of the Contracts (Malay States) Ordinance, did not apply to earnest money;

(4) section 75 of the said Ordinance did not apply when a contract was properly terminated and the deposit forfeited, whether or not damages were proved.

Cases referred to:-

(1) *H.C. Mills* v. *Tata Air Craft* A.I.R. 1970 S.C. 1986.

(2) *Linggi Plantations Ltd.* v. *Jagatheesan* [1969] 2 M.L.J. 253; on appeal to the Privy Council, *ante* p. 89.

The following cases were also cited in argument: *Skyline Trading Co.* v. *Tiow Yoke Lan* [1969] 2 M.L.J. 212; *Scammell* v. *Ouston* [1941] 1 All E.R. 14, 25D-G; *Nune Sivayya* v. *Maddu Renganayakulu* 62 I.A. 89, 98; *Bishop & Bazter Ltd.* v. *Anglo-Eastern Trading & Industrial Co. Ltd.* [1943] 2 All E.R. 598; 599B; *Rossiter* v. *Miller* [1874-80] All E.R. Rep. 465; *Maula Bux* v. *Union of India* A.I.R. 1970 S.C. 1955; *Shree Hanuman Cotton Mills et al* v. *Tata Air Craft Ltd.* A.I.R. 1970 S.C. 1986, 1998; *Chiranjit Singh* v. *Har Swarup* A.I.R. 1926 P.C. 1; *Murlidhar Chatterjee* v. *Indian Film Co.* A.I.R. 1943 P.C. 34; *Govindram Gordhandas Seksaria et. al.* v. *State of Gondal et al.* A.I.R. 1950 P.C. 99, 104; *Yong Mok Hin* v. *United Malay States Sugar Industries Ltd.* [1967] 2 M.L.J. 9; *Yeo Long Seng* v. *Lucky Park (Pte.) Ltd.* [1971] 1 M.L.J. 20; *Scott* v. *Bradley* [1971] 1 All E.R. 583, 584; *Fateh Chand* v. *Balkishan Dass* A.I.R. 1963 S.C. 1405; *Union of India* v. *Pearl Hosiery Mills* A.I.R. 1961 Punjab 281, Headnote (b).

FEDERAL COURT.

V. K. Palasuntharam for the appellant.

Liew Meng Teck for the respondent.

Cur. Adv. Vult.

Suffian F.J., (delivering the judgment of the court): The plaintiff wanted to buy a house for $49,720 from the defendant company who were housing developers.

On 13th July, 1964, the plaintiff paid the company a deposit of $4,000. He signed a document, Exhibit A, which was also signed on behalf of the company. It reads as follows:

"

Date 13.7.64

APPLICATION TO
PETALING GARDEN CO., LTD.
40, Petaling Garden
Petaling Jaya
From

Name MR. KARRUPPIAH S/O RAMASAMY I/C No. 2650183
Address 363, Ipoh Road,
Kuala Lumpur.

To Purchase

Lot No. 459 Phase IV House type B
Total Price = $49,720/-
Deposit Paid = $4,000/- Receipt No. 24071.
M.B.B.S. Ltd. fee paid = $ Nil

I hereby agree to abide by the conditions of sale printed overleaf.

Signed (Illegible)
APPLICANT'S SIGNATURE

Accepted by

Signed (Illegible)
PETALING GARDEN CO., LTD.

CONDITIONS OF SALE

1. The applicant shall be registered as the purchaser.
2. The applicant shall not transfer or assign this property to any other person without the prior consent of the company.
3. Changes from one lot to another will not be allowed after the acceptance of this application.
4. The applicant is deemed to have inspected and accepted the proposed plan of the house and specifications and the siting of the lot.
5. The required deposit has to be paid on the acceptance of this application.
6. The deposit cannot be withdrawn or refunded and shall be forfeited to the company on the applicant's failure to proceed with the proposed purchase.
7. If the applicant should require a loan from the Malaya Borneo Building Society Ltd., Kuala Lumpur, a supervision and processing fee of $150 only charged by the society has to be paid on the acceptance of this application and a loan application form must be completed and submitted through the company when requested to do so, otherwise the loan allocation will be cancelled.
8. The agreements in connection with this sale must be executed within the stipulated period when requested by the company's solicitors.
9. Payments, when due, must be paid within 7 days from the date of notice, otherwise the company has the right to re-sell the property.
10. Requests for additions and variations must be in writing, but the company is not bound to accept them. Those that require amendments to plans and approval of the authorities will not be accepted.
11. All legal fees, stamp duty, transfer fees, electricity and water supply connection charges and the necessary deposits are to be borne by the purchaser.
12. Any breach of the foregoing conditions will render this application null and void and the deposit shall be forfeited.

SCHEDULE OF PAYMENTS

1.	Deposit	$ 4,000.00
2.	Payment for land (on conveyance)	12,720.00
3.	Commencement of foundation works	4,000.00
4.	Construction up to 1st floor level	4,000.00
5.	Completion of 1st floor concrete work	6,250.00
6.	Construction up to wall-plate level	6,250.00
7.	Building roofed-in	6,250.00
8.	Building ready for occupation	6,250.00
	Total =	$49,720.00"

It will be noted that by Exhibit A the plaintiff agreed to abide by the conditions of sale which were printed on the exhibit. It seems from condition 8 that the plaintiff was also expected to sign other agreements.

On 12th May, 1965, the company wrote a letter to the plaintiff, Exhibit B, asking him to call on the company's solicitors to sign the agreements and make certain payments.

The plaintiff did not call on the company's solicitors and on 16th August the company sent him a letter to remind him to do so.

On 26th February, 1966, the company's solicitors wrote to the plaintiff a letter, Exhibit D. After referring to the company's letter and its reminder, the solicitors reminded the plaintiff of condition No. 6 which reads:

"The deposit cannot be withdrawn or refunded and shall be forfeited to the company on the [plaintiff's] failure to proceed with the proposed purchase."

The company's solicitors told the plaintiff that this condition would entitle the company to cancel the plaintiff's booking and to forfeit his deposit, and gave notice that, unless he called at their office to execute the agreements and to make some payments within seven days, the company would have no alternative but to cancel his booking and to forfeit his deposit. In the event the plaintiff failed to execute the agreements and his deposit was forfeited.

On 30th March, 1966, the plaintiff's solicitors wrote letter Exhibit D3 asking the company to return the plaintiff's deposit. The letter gave two reasons for this demand:

(1) there had been undue delay by the company; and

(2) no proper agreement had been signed.

The company did not return the deposit.

Nothing more happened until four years later when the plaintiff's solicitor sent another letter P2 to the company demanding the return of the $4.000. This time he acted through another solicitor, and only one reason was given for the demand for the return of the deposit. This time it was simply said that there was no concluded agreement between the plaintiff and the company.

The company did not return the deposit. On 27th May, 1970, the plaintiff brought an action in the sessions court for the return of the $4,000. The company resisted the claim, relying on condition 6.

The plaintiff lost both there and, on appeal, in the High Court, and he now appeals to us.

We are of the opinion that the plaintiff has no leg to stand on and that his appeal should be dismissed with costs.

The first question that arises is whether or not there was a concluded contract as alleged by the company. On this question we have scrutinised carefully Exhibit A and are of the opinion that it constituted a completed contract. There is no doubt that, if the company had tried to get out of this transaction, the court would have little difficulty on the terms of Exhibit A alone in finding against it and in the plaintiff's favour.

Before us the plaintiff's counsel strenuously argues that the principal agreement (Exhibit D4) and the supplemental building agreement (Exhibit D5) which the plaintiff was asked to sign, contain several conditions which were not covered by the conditions of sale listed in Exhibit A, and that therefore the plaintiff was entitled to refuse to sign them, as they introduced new terms.

In our judgment the plaintiff cannot rely on this argument because he never asked to see D4 and D5. In cross-examination he admitted that he had never seen them before the trial which began on 30th October, 1970. If he had asked to see D4 and D5 and, having seen and studied them, had protested their contents, then there might have been something in his argument.

With respect we agree with the learned appellate judge that probably the plaintiff had refused to perform his part of the bargain not because of alleged dissatisfaction with the terms of the proposed agreements, but because of financial difficulties or other reasons.

The next argument has reference to item 2 of the schedule of payments, according to which the plaintiff was to pay $12,720 being "payment for land (on conveyance)". The argument is that none of the three letters sent by the company or their solicitors offered the plaintiff a conveyance at the same time as or immediately after payment for the land. We do not think that this argument can hold water, because at no time did the plaintiff have the money on the table ready to pay the company. Things might have been different if he had offered to pay the company the money demanded only to find that the company was in no position to convey the land.

The third argument has reference to the learned appellate judge's finding that the $4,000 was paid as earnest money. This finding was disputed before us, but with respect we think that on the evidence it is clear that the deposit was earnest money. It was paid at the time when the contract was entered into, Exhibit A refers to it as "deposit" and condition 6 expressly provides that it shall be forfeited to the company on the plaintiff's failure to proceed with the purchase. There is no ambiguity about it caused either by the language of Exhibit A or by the subsequent conduct of the parties.

Counsel for the plaintiff next refers us to the provisions of sections 65, 66 and 75 of the Contracts (Malay States) Ordinance No. 14 of 1950 which read as follows:

"65. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

66. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

75. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

With respect we do not think that section 66 is relevant at all.

As regards section 65, it is said that, if the company has the option to rescind this contract, then as the $4,000 deposit received by it is a benefit received from the plaintiff, the company must under section 65 restore that benefit to the plaintiff. The 1957 edition of *Pollock and Mulla* on the Indian Contract Act says this (at page 386) about the effect of the corresponding Indian section on earnest money:

"The Act requires that a party must give back whatever he received under the contract. The benefit, however, to be restored must be benefit received *under* the contract. A. agrees to sell land to B. for Rs. 40,000. B. pays to A. Rs. 4,000 as a deposit at the time of the contract, the amount to be forfeited to A. if B. does not complete the sale within a specified period. B. fails to complete the sale within the specified period, nor is he ready and willing to complete the sale within a reasonable time after the expiry of that period. A. is entitled to rescind the contract and to retain the deposit. The deposit is not a benefit received *under* the contract; it is a security that the purchaser would fulfil his contract, and is *ancillary* to the contract for the sale of the land."

The 1965 edition of *Sanjiva Row* on the Indian Contract Act is to the same effect. It says at page 1196:

"A deposit for sale is not a benefit under the contract. It is a security that the purchaser would fulfil his contract and is ancillary to the contract of the sale of property. Therefore where the purchaser does not complete the sale

within the specified time, nor is he ready to complete it within a reasonable time after the expiry of that period, the seller may rescind the contract and retain the profit."

In 1969 the Indian Supreme Court in *H. C Mills* v. *Tata Air Craft*[1] held at page 1998 that the corresponding Indian section does not apply to earnest money and that (in other words) a party in the position of the company here is entitled to retain it.

Since writing this judgment we have seen a very recent judgment of the Privy Council delivered on 7th December, 1971, in *Linggi Plantations Ltd.* v. *Jagatheesan,* an appeal from a decision[2] of this court, in which their Lordships held that our section 65 did not apply to earnest money.

The same Privy Council judgment also held that section 75 did not apply when a contract was properly terminated and the deposit forfeited, whether or not damages were proved.

In our judgment the company here is entitled to keep the deposit paid by the plaintiff and we would therefore dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *V. K. Palasuntharam; Chung & Huang.*

WONG LOK KHIAM v. DATO PETER LO SU YIN & ORS. (NO. 3)

[O.C.J. (Lee Hun Hoe J.) February 7, 1972]

[Kota Kinabalu — Civil Suit No. 340 of 1971]

Practice and Procedure — Writ — Representative capacity of plaintiff stated in title — Misnomer — Irregularity — Fresh step in action — Whether can be set aside — R.S.C. 1957, O. 72 r. 2.

Practice and Procedure — Injunction — Interim injunction — Discharge of.

In this action the plaintiff who described himself in the title of the action as "Secretary-General of the Sabah Chinese Association" sued the defendants for a declaration that they were not duly elected officers of the Sabah Chinese Association and sought various orders to restrain them from acting as such officers. The plaintiff obtained an interim injunction but the defendants failed in their application by motion to discharge the injunction. The defendants then tried to set aside the writ, maintaining that the plaintiff had no *locus standi* and was not competent to institute the action, one of the grounds being that the plaintiff not being a registered public officer under the Societies Act 1966 could not sue on behalf of the Sabah Chinese Association.

The facts appear sufficiently from the judgment below.

Held: (1) although the title contains the words "Secretary-General of the Sabah Chinese Association" the indorsement is completely clear of any indication of representative capacity. The misdescription in the title is never fatal and it can always be cured by amendment as in the case of a misnomer. At the most the description is an irregularity and the plaintiff can take steps to amend the writ;

(2) the defendants had knowledge of the irregularity as the same points were raised in the earlier hearing to discharge the interim injunction. Accordingly, by moving the court to discharge the interim injunction, a fresh step had been taken.

[Editorial Note: For earlier proceedings, see *ante* pages 138 and 166].

Cases referred to:-

(1) *Ong Boon Seong* v. *Syed Hussein Alatas* [1971] 2 M.L.J. 218.

(2) *John* v. *Rees & Ors.* [1969] 2 All E.R. 274.

(3) *Bowler* v. *John Mowlem & Co. Ltd.* [1954] 3 All E.R. 556.

(4) *Pearlman (Vencers) S.A. (Pty.) Ltd.* v. *Bartels* [1954] 3 All E.R. 659.

SUMMONS.

W. K. Loo for the plaintiff.

Nicholas Fung for the defendants.

Lee Hun Hoe J.: As a result of a meeting convened by the first defendant on 16th October, 1971, the plaintiff sued the defendants. At the same time he applied for and was granted an interim injunction by Ismail Khan C.J. on 18th October, 1971 until 15th November, 1971 when it was extended by Seah J. For reasons, which I need not have to elaborate, Seah J. was unable to deal with a motion to discharge the interim injunction. On 8th December, 1971 that motion was heard by B. T. H. Lee J. and on 7th January, 1972 he dismissed the application.

On 23rd November, 1971 the defendants entered conditional appearance. By the memorandum of conditional appearance it is endorsed that this appearance is to stand as unconditional unless the defendants apply within fifteen days to set aside the writ, or service thereof, and obtain an order to that effect. For this purpose the defendants took out the present summons on 7th December, 1971.

The defendants maintain that the plaintiff has no *locus standi* and is not competent to institute the action on the following grounds: —

"(1) Under section 9(c) of the Societies Act, 1966 the plaintiff cannot sue on behalf of the Sabah Chinese Association as he is not the registered public officer of the said Sabah Chinese Association and/or

(2) The plaintiff purports to sue as secretary-general of the said Sabah Chinese Association which is not an office recognised in law and in any event no resolution has been passed or other authority has been given to the plaintiff to issue out the writ in this action as secretary-general of the said Sabah Chinese Association and/or

(3) The plaintiff's term of office and that of the former central executive committee of the said Sabah Chinese Association expired on the 8th day of July 1970 and therefore he is *functus officio;*"

In support of the application is the affidavit of the first defendant and an exhibit in the form of a letter dated 12th November, 1971 written by the Timbalan Pendaftar Pertubohan, Sabah. This short letter reads:—

"In reply to your letter dated 11th November 1971, I am to inform you that no member of the Sabah Chinese Association has been declared to and registered by me as the public officer of the association under section 9(c) of the Societies Act, 1966."

The plaintiff did not file any affidavit in reply. Reference was made to affidavits previously sworn by